Office-Supreme Court, U.S.
FILED
MAR 15 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. 770

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL and FREDERICK KATZNELL,

Petitioners,

AGAINST

ARNOLD A. WEINSTEIN, JEROME FRIED, NAZARETH FAIR GROUNDS and FARMERS' MARKET INC., et al.,

Respondents.

IN THE MATTER

OF

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.,

Debtor.

Brief for Respondent Nazareth Fair Grounds & Farmers Market, Inc., Debtor and Debtor in Possession in Opposition to Petition for Certiorari

ALEX L. ROSEN,
Counsel for Respondents Nazareth Fair Grounds & Farmers Market, Inc. Debtor & Debtor in Possession,
225 Broadway,
New York 7, New York.

MARVIN N. ROSEN,
On Brief.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth 2-0689

INDEX

	PAGE
Statement	1
The Facts in Case No. 27,000	2
The Facts Condensed in Case No. 26,362	2
The Issues in Case No. 27,000	5
The Issues in Case No. 26,362	5
The Law on Case No. 27,000	5
POINT I.—A Bankruptcy Court is not required to apply State Statutes in allowing or disallowing claims	5
The Law on Case No. 26,362	9
POINT II.—The restrictions and penalties imposed under Chapter X, Article 13, Section 249 should not be applied to an officer or employee hired by a debtor in possession under Chapter X, Article 8, Section 19	9
Commentary	10
CONCLUSION	16

CASES CITED

American Surety Company v. Sampsell, 327 U. S. 269, 66 Sup. Ct. 571	7
Davis v. Las Ovas Co., 227 U. S. 80, 30 Sup. Ct. 197	8

PAGE

Erie R. Co. v. Tompkins, 304 U. S. 54, 58 Sup. Ct. 817 6

Holmberg v. Ambrecht, 327 U. S. 392, 66 Sup. Ct. 582 6

Kelley, Glover & Vale, Inc. v. Kramer, 344 U. S. 914, 73 Sup. Ct. 337 7

Kisterbock, Appeal of, 127 Pa. 601, 18 A. 381 8

McCandless v. Furland, 296 U. S. 80, 56 S. Ct. 41, 140 L. Ed. 158 8

Moores v. Citizens' National Bank of Piqua (1884), 111 U. S. 156 8

National Bank of Shamokin v. Waynesboro Knitting Co., 314 Pa. 365, 172 A. 131 8

Pepper v. Litton, 308 U. S. 295, 60 Sup. Ct. 238 ... 7

Prudence Realization Corporation v. Geist, 316 U. S. 89, 62 Sup. Ct. 978 6

Vanston v. Bondholders Protective Committee v. Green, 329 U. S. 156, 67 Sup. Ct. 237 7

Zohrosky v. Leschinskey, 394 Pa. 368, 147 A. D. 2d 362 8

STATUTES CITED

Chapter X, Article 8, Section 191 3

Bankruptcy Act 5, 6, 7, 9

Pennsylvania Constitution, Acts 16 and 17 8

Supreme Court of the United States

OCTOBER TERM 1961

No. 739

IRVING J. WOLF, ROBERT H. DAVIDSON, RICHARD S. HULL and FREDERICK KATZNELL,

Petitioners,

AGAINST

ARNOLD A. WEINSTEIN, JEROME FRIED, NAZARETH FAIR GROUNDS and FARMERS' MARKET INC., et al.,

Respondents.

In the Matter

of

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.,

Debtor.

Brief for Respondent Nazareth Fair Grounds & Farmers Market, Inc., Debtor and Debtor in Possession in Opposition to Petition for Certiorari

Statement

Petitioners pray that Writs of Certiorari issue to review the two judgments of the Court of Appeals for the Second Circuit, to wit, in:

1. Case No. 27,000—Where the Court of Appeals by judgment made and entered on November 9, 1961 resolved the allowance, disallowance or modification of stock claimants by affirming in part, modifying or reversing in part the order of the District Court of the Southern District of New York;

2. Case No. 26,362—Where the Court of Appeals by judgment made and entered on November 9, 1961 reversed that part of the order of the District Court of the Southern District of New York which prohibited Weinstein, the President of the Debtor and Debtor in Possession from having anything to do with the operations of the debtor's business and which discharged Fried, the manager of the Debtor and Debtor in Possession from his employment, and affirmed that part of the order which failed to direct Weinstein and Fried to reimburse the Debtor for the compensation and expenses heretofore paid and received by them.

The Facts in Case No. 27,000

The facts in this case are more than adequately set forth in Judge Moore's opinion, which appears in Appendix A, pages 33a to 47a inclusive of the Petition for Writs of Certiorari, and to which the writer respectfully refers this Court.

The Facts Condensed in Case No. 26,362

The facts elicited on the trial but not fully reported in the Court of Appeals' decision are respectfully submitted.

After the reorganization, the District Court signed an order authorizing the Debtor to operate the business of

the Debtor in Possession. Arnold Weinstein, who had been elected President, and Jerome Fried, who had been designated as General Manager, were authorized by the District Court to perform their duties on behalf of the Debtor in Possession. They were in fact employees of the Debtor and Debtor-in Possession and their weekly salary was fixed by order of the Court, under Chapter X, Article 8, Section 191.

From 1951 to August 1953 the Debtor was bankrupt factually, and technically as defined in the Bankruptcy Act. The Debtor's business operated at a loss prior to the inception of this proceeding.

Weinstein's and Fried's management was so successful that an operating loss was turned into a profit and by 1960, the Debtor was able to realize a profit of approximately $45,000.

In 1955, Melvin Lloyd Robbins, Esq. first appeared in this proceeding. He claimed that he represented a Wilson Rehrig and a Martin Philip, Esq., Mr. Rehrig's attorney. Mr. Rehrig was a tenant of the Debtor in Possession whose lease expired. He wanted a new lease at about the same rental as he had been paying before. He wanted the Debtor in Possession to make certain improvements to that portion of the premises leased to him. Since the cost of operations and maintenance had increased, the Debtor in Possession required and was getting increased rentals from almost all of its other tenants. Rehrig refused to pay an increase, or even pay the increased rental which had been offered by a prospective tenant who was interested in the same space. Rehrig further demanded a monopoly or exclusive tenancy in the meat and provision business, so that no other merchant could sell meat and provisions on the Debtor's premises.

As a result of the foregoing, negotiations were stalemated. Suddenly, Robbins started to raid the Debtor by purchasing the stock of certain stock claimants in an endeavor to obtain control of the Debtor. Rehrig, has admitted in open Court when he was on the witness stand that he had a conflict of interest with the Debtor, and that if he got control of the Debtor he would attempt to give himself an exclusive lease at a beneficial rental.

Thereafter, certain stock claimants told Weinstein and Fried that they had been approached by Robbins and asked whether they would sell their stock to him. Weinstein and Fried advised them not to sell their stock, that Debtor's prospects were good. The foregoing was substantiated by the testimony of these stock claimants in Court. They testified that they intended to sell their stock to either Robbins, or Weinstein and Fried and, that under those circumstances, they had sold their stock to Weinstein and Fried.

Weinstein and Fried testified that they bought stock in an endeavor to comply with the trust imposed upon them in order to prevent control of this corporation from falling into the hands of a "raider" whose interests conflicted with the Debtor's.

The District Court by its decision held that assuming the truth of the foregoing, he was still technically bound by Section 249, to remove Fried and Weinstein so that they could not participate in the Debtor's operations.

In question 1 presented on page 3 of petitioners' brief, Mr. Robbins has attempted to smear Weinstein and Fried by alleging that they diverted the Debtor's rents to themselves. This charge is totally false, unsubstantiated by the proof in this case. It has no place in the issues submitted on this petition for Certiorari.

The Issues in Case No. 27,000

I. In determining which claimants shall share in the liquidation of the bankrupt's estate as general creditors or as stock claimants, is a Bankruptcy Court required to follow State law, or can it apply its own equitable principles?

II. Does petitioners' application pose a constitutional question or a question undecided and of such major importance as would warrant the granting of a Writ of Certiorari?

The Issues in Case No. 26,362

I. Does Section 249 of the Bankruptcy Act apply to an officer or general manager of a Debtor in Possession who are receiving compensation pursuant to Sections 189 and 191?

II. In the event Section 249 does apply, should an officer and general manager who salvaged and successfully operated a bankrupt debtor be penalized and removed from employment and have the compensation heretofore paid to them confiscated because they purchased stock solely to stop a raider, who had a conflict of interest with the Debtor from obtaining control of the Debtor?

The Law on Case No. 27,000

POINT I

A Bankruptcy Court is not required to apply State Statutes in allowing or disallowing claims.

Jurisdiction to allow or disallow claims is based on Section 2A (2) of the Bankruptcy Act which is made applicable to Chapter X proceedings by virtue of Section 102

of the Bankruptcy Act. This Court has consistently followed the principle that a Court of Bankruptcy speaks as a Court of Equity and allows or disallows claims by applying its own equitable theories and its own substantive law of bankruptcy and is not bound by State Statutes or theories. The petitioner has stressed *Erie R. Co.* v. *Tompkins* to support his contention that a Court of Bankruptcy must follow state law.

This Court in the case of *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, 62 Sup. Ct. 978, stated however:

> "Nothing decided in Erie R. Co. v. Tompkins 304 U. S. 54, 58 Sup. Ct. 817 requires a Court of Bankruptcy to apply such local rules governing the liquidation of insolvent estates.
>
> "The Bankruptcy Act prescribes its own criteria for a distribution to creditors.
>
> "In the interpretation and application of federal statutes, federal, not local law applies."

This Court in the case of *Holmberg* v. *Ambrecht*, 327 U. S. 392, 66 Sup. Ct. 582, stated:

> "The considerations that urge adjudication by the same law in all courts within a state when enforcing a right created by that state are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a state legislature but by congress.
>
> "The present case concerns not only a federally created right but a federal right for which the sole remedy is in equity * * * we do not have the duty of a federal court sitting as it were as a court of a state to approximate, as closely as may be state law, in order to vindicate without discrimination a right derived solely from a state. We

> have the duty of federal courts sitting as national courts throughout the country to apply their own principle in enforcing an equitable statute created by congress."

This Court further held in *Pepper* v. *Litton*, 308 U. S. 295, 60 Sup. Ct. 238:

> "In passing upon the allowance of claims, a bankruptcy court sits as a court of equity clothed with jurisdiction to sift the circumstances in the administration of the bankrupt estate."

In *Kelley, Glover & Vale, Inc.* v. *Kramer*, 344 U. S. 914, 73 Sup. Ct. 337, this Court denied Certiorari from a Court of Appeals decision, 198 F. 2nd 392, where the same issue was involved. The Court held that where the allowance or disallowance of claims is an issue, a bankruptcy court is not required to follow state statutes.

This Court held in *Vanston* v. *Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 162, 67 Sup. Ct. 237, 240, that the bankruptcy court must enforce the Bankruptcy Act as interpreted by this Court with authority granted by Congress to determine how and what claims would be allowed under equitable principles. These general principles are again enunciated by this Court in *American Surety Company* v. *Sampsell*, 327 U. S. 269, 66 Sup. Ct. 571.

In any event, petitioner's theory of the law, that Pennsylvania Law as set forth in its statutes and Court decisions forbid the cancellation of stock issued to stock claimants who paid no consideration to the Debtor, and relegates the corporation to having a lien on the stock, followed by foreclosure is not in conformity with the decisions of the Courts of Pennsylvania or of this Court.

Cf. National Bank of Shamokin v. *Waynesboro Knitting Co.*, 314 Pa. 365, 172 A. 131, 133. *Appeal of Kisterbock*, 127 Pa. 601, 18 A. 381. *Moores* v. *Citizens' National Bank of Piqua* (1884), 111 U. S. 156.

It is important to note that the Supreme Court held in *McCandless* v. *Furland*, 296 U. S. 80, 121, 56 S. Ct. 41, 140 L. Ed. 158, that the act of promoters also violated Acts 16 and 17 of the Pennsylvania Constitution forbidding corporations to issue stock or bonds, except for money, labor or property actually received and declaring all fictitious increases void. This prohibition may not be set aside by shareholders to the prejudice of creditors or other shareholders, present or prospective.

This Court in a similar case involving promotions and syndication of a corporation formed in the State of Pennsylvania held in the case of *Davis* v. *Las Ovas Co.*, 227 U. S. 80, 30 Sup. Ct. 197:

> "Where the fraud on a corporation resulted in the issuing of more stock than would otherwise be necessary, the proper decree is to compel those who fraudulently obtained the additional stock, to surrender it for cancellation and such stock should be cancelled;"

Constructive trusts or the imposition of trusts have been sustained by the highest courts in Pennsylvania. (*Cf. Zohrosky* v. *Leschinskey*, 394 Pa. 368, 147 A. D. 2d 362.)

The Law on Case No. 26,362

POINT II

The restrictions and penalties imposed under Chapter X, Article 13, Section 249 should not be applied to an officer or employee hired by a debtor in possession under Chapter X, Article 8, Section 19.

Respondents cannot improve on the determination of the law on the issues involved as stated by the Court of Appeals and respectfully refers this Court to the decision thereto.

However, eliminating the technicalities and going to the merits, it is unbelievable that Congress or the courts intended that any statute should be interpreted and utilized so as to destroy the very purpose of its creation, and thus aid the evil doer and condemn the innocent; so as to compel a trustee or fiduciary to violate his trust.

True, Section 249 was specifically enacted so that trustees and fiduciaries or their agents should not trade in a reorganized company's stock for their own pecuniary benefit or for profit. However, the primary purpose of this and other like sections of the bankruptcy act were enacted to protect the debtor, its creditors and stockholders.

When the petitioners, whose interests were in direct conflict with the debtor, raided and attempted to get control of the debtor, it was the primary duty of Weinstein and Fried, in the interests of the debtor, to stop that plan from being effectuated.

Weinstein and Fried, under those circumstances had to buy stock.

Their own pecuniary benefit was not served.

They did not know whether the stock they purchased had any validity. As a matter of fact, a substantial portion of the stock so purchased by them was strenuously opposed on the trial of the claims and on appeal by the attorney for the Debtor and was disallowed.

There is no basis technically factually, morally or otherwise for a Writ of Certiorari to be granted as petitioned for.

Commentary

The record does not sustain petitioner's statements of the facts and I feel impelled to observe that in it there are numerous errors of fact as well as facts which are wholly outside the record.

CONCLUSION

The petition for writs of certiorari should be denied.

Dated: New York, New York
March 1962.

ALEX L. ROSEN,
Counsel for Respondent Nazareth Fair Grounds & Farmers Market, Inc. Debtor & Debtor in Possession,
225 Broadway,
New York 7, New York.

MARVIN N. ROSEN,
On Brief.